United States District Court
District of Massachusetts.

MARION KAPLAN,
PLAINTIFF,

v.

SAMUEL W. BLACK,
DEFENDANT.

Civil Action No. 81-1917-MC

MEMORANDUM AND ORDER.

January 25, 1982

McNAUGHT, D.J.

This action came on to be heard on defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The plaintiff, a Massachusetts resident, alleges that the defendant, her brother and a resident of New York, tortiously interfered with an advantageous business relationship between the plaintiff and her mother. This case finds its roots in intrafamily disputes dating to 1956, the year of the death of Joseph Black, the father of the parties in this action. A controversy arose at that time concerning the distribution of Joseph's estate. Plaintiff asserts that her brother's animosity towards her and the numerous intrafamily legal squabbles are due to the fact that she inherited the major portion of their father's estate.

Allegedly at the time of the settlement of Joseph Black's estate, plaintiff reached an agreement with Rose Black, her mother, that in return for plaintiff's payment of $55,000 to the defendant to achieve that settlement, Mrs. Black would devise three parcels of real estate to the plaintiff. Plaintiff asserts that she made that payment to the defendant. During 1966, Mrs. Black executed a will devising the three parcels of property to the plaintiff. Defendant allegedly attempted to have his mother change the will.

On July 14, 1976, Mrs. Black executed deeds conveying the three parcels of property to the defendant. In November of 1976, Mrs. Black brought suit against the defendant alleging that due to her infirm condition she was induced to sign the deeds by means of fraud and undue influence.

Judgment was entered for the defendant when the jury found in answer to a special question that Mrs. Black had sufficient mental capacity to understand the nature and consequences of her actions. Mrs. Black then moved for a new trial, which was denied by the trial judge. The Supreme Judicial Court affirmed that denial. *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978).

In an action brought by the plaintiff against the defendant in Middlesex Superior Court, plaintiff sought a declaration that she was deprived of the parcels of property due to the fraud of her brother. She also sought to have a trust impressed upon the property in her favor and for her benefit and an order requiring defendant to convey the property to her.

Defendant's motion to dismiss in that action was allowed by Judge Hiller Zobel of the Superior Court, who found that the plaintiff was barred from pursuing her action by the result in *Black* v. *Black*, *supra*. The judge found that Mrs. Black and the plaintiff shared interests sufficiently identical to compel the court to treat them as one. In addition, he held that the

jury verdict and the judgment entered required a finding not only that Mrs. Black was competent but also that the defendant had not obtained the property from her through fraud or undue duress. He held the finding of no fraud or undue influence was essential to the judgment in *Black* and precluded recovery in the case before him. "A would-be beneficiary stands as against a proprietary usurper, in the shoes of the testator" ruled Judge Zobel, and thus applied the doctrine of issue preclusion (estoppel). The dismissal was upheld by the Massachusetts Appeals Court in May, 1981. *Kaplan* v. *Black*, 1981 Mass. App. A.S. 1033, 421 N.E.2d 90, (1981). Further appellate review was denied on July 15, 1981.

In the present action, plaintiff alleges that her brother interfered with an advantageous relationship between her and her mother and that her rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the decision of Judge Zobel dismissing her complaint in Middlesex Superior Court since she was not allowed the opportunity to litigate her claims against her brother.

Plaintiff is precluded from bringing her claims in this c[illegible] by the doctrine of *claim* preclusion. As recently explained by the First Circuit,

> Claim preclusion — the doctrines of merger and bar — is applied to prevent parties from relitigating the issues arising out of the same transaction; when either party prevails in an action concerning a transaction, all of the plaintiff's possible rights to remedies against the defendant arising out of that transaction are extinguished.

Roy v. *Jasper Corporation*, No. 81-1453, slip op. at 6 (1st Cir. December 14, 1981).

The claim which plaintiff seeks to pursue here arose out of the same transaction which was the subject of the state proceedings in *Black* v. *Black*, *supra*, and *Kaplan* v. *Black*,

supra. The defendant in this case prevailed in those state actions. The plaintiff is now attempting, under the guise of a different claim, to accomplish that which was denied her in two state proceedings.

The suit here is tailored differently since it was last presented in the state courts. It now is called a claim for *tortious interference with an advantageous business relationship*, but the claim is the same as it always was, based upon the same factual allegations, involving the same parties and the same property. The "theory of liability" is given a different label.

So far as I am aware, the theory has never been applied by the Massachusetts Courts to a fact pattern like this. Interference with the relationship of testatrix-beneficiary to the detriment of the beneficiary by another potential beneficiary who hopes to obtain the property by conveyance or demise has not been recognized as a ground for redress in this manner. The brother is viewed as a "lawful competitor" of the owner's largesse unless advantage is secured by undue influence.

At any rate, the plaintiff had the opportunity to allow the Massachusetts Courts to pass upon the validity of such a theory and did not do so.

The claim of deprivation of constitutional rights is hardly worthy of being noted. It has no substance, and cannot provide a basis for this court's exercise of jurisdiction.

For those reasons, defendant's motion to dismiss must be allowed.

[SIGNED]

John J. McNaught
United States District Judge

United States Court of Appeals
For the First Circuit

No. 82-1208.

MARION KAPLAN,
PLAINTIFF, APPELLANT,

v.

SAMUEL W. BLACK,
DEFENDANT, APPELLEE.

JUDGMENT

Entered July 26, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Double costs are awarded in favor of the appellee.

The requests for damages and for attorney's fees are denied.

By the Court:

[SIGNED]

Dana H. Gallup
Clerk.

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 82-1208

MARION KAPLAN,
PLAINTIFF, APPELLANT,

v.

SAMUEL W. BLACK,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before
Rosenn,* *Senior Circuit Judge*,
Campbell and Breyer, *Circuit Judges*.

Nicholas J. Decouloc, for appellant.
Elihu Pearlman, with whom *Fred Erlich* was on brief, for appellee.

July 26, 1982

Per Curiam. Appellant appeals from the district court's dismissal of her action against her brother. The district court held the action to be foreclosed by a previous state court judgment growing out of the same matter. *See Kaplan* v. *Black*, 1981 Mass. App. Ct. Adv. Sh. 1027, 421 N.E.2d 90 (1981).

* Of the Third Circuit, sitting by designation.

Appellant concedes that she could not pursue the present federal action if it were merely a repeat performance (possibly under diversity jurisdiction) of the prior state case. She recognizes that a disappointed state litigant may not start all over again in the federal court with the same claim brought in the state court.

Appellant argues, however, that her present claim is different, being in essence a civil rights suit based on the state court's allegedly unconstitutional decision. In particular, appellant insists that the superior court justice acted unconstitutionally when he threw out her state claim on the ground that it was precluded by an earlier state suit initiated by her mother. *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978). This ruling, she says, violated the due process clause of the federal Constitution because it deprived her of her day in court.

This circuit has held, however, that a litigant who could have raised a relevant federal constitutional claim in a state court proceeding he brought, is barred by the doctrine of res judicata from later doing so in a separate proceeding filed for the purpose in federal court. *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974). If appellant believed that Justice Zobel's ruling was unconstitutional, she could and should have made that contention to Justice Zobel and if necessary to the Massachusetts appellate courts, all of which tribunals were fully competent to hear and adjudicate federal constitutional issues. She did not do so, and was thereafter barred from commencing a new round of lawsuits in the lower federal courts for the purpose, ostensibly, of raising that issue.*

Affirmed with double costs for appellee.

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* We say "ostensibly." In her complaint in the district court appellant nowhere set forth, as all responsible federal litigants should do, the statutory basis for her federal lawsuit. This suggests that her attorney did not know, or perhaps did not care, whether there was a basis for bringing such a suit.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT

MIDDLESEX COUNTY No. 79-759

MARIAN KAPLAN

vs.

SAMUEL W. BLACK

MEMORANDUM AND ORDER FOR JUDGMENT.

Litigational Background.

Plaintiff and Defendant are sister and brother. The present litigation, culminating decades of intrafamily hatred, seeks: (1) A declaration that Defendant, by fraud, deprived Plaintiff of certain land ("the Property") devised to her by their mother, Rose Black ("Rose"); (2) The impression of a trust upon the Property in Plaintiff's favor and for her benefit; and (3) An order requiring Defendant to convey the Property to Plaintiff.

After both parties filed pre-trial memoranda and Plaintiff's attorney made an extensive opening, Defendant's attorney moved to dismiss. The parties have also filed through supplemental memoranda.

For purposes of ruling on the motion, the Court assumes all of counsel's statements to be true and regards as drawn all rational inferences which the facts contained in those statements will support. The Court may allow the instant motion only if, after crediting all of such assumptions and inferences, it concludes that Plaintiff cannot establish a right to relief, 8 J. Smith and H. Zobel, *Rules Practice* 58 (1977). Although Massachusetts Rule of Civil Procedure 41 does not explicitly allow a dismissal on the opening in non-jury cases, the Court nonetheless possesses power to entertain such a motion, *ibid.*

Facts.

Rose, who had for many years been estranged from Defendant, had been married to Joseph Black ("Joseph"), who died in 1956. A controversy arose over the distribution of Joseph's estate which Rose and Joseph's three children (Defendant, Plaintiff, and one other child, since deceased) settled in early 1957.

In 1956, during the negotiations leading to the settlement, Rose had told Plaintiff that upon Rose's death, Plaintiff would receive the Property, which included the land and building where Rose resided. This statement was never reduced to writing.

In 1958, Rose told Plaintiff she would construct a three-room addition to her residence if Plaintiff and her family would move into the house. Plaintiff told Rose that she would take care of Rose. Rose again said, as she had earlier, that upon Rose's death, the Property would go to Plaintiff. None of these statements was ever reduced to writing.

In 1966, Rose executed a will ("the 1966 Will") which devised the Property to Plaintiff but mentioned no particular reason for the devise.

On July 14, 1976, Rose executed deeds for the various parcels comprising the Property and delivered them to Defendant, who duly recorded them, thus transferring title to the Property to himself.

On November 4, 1976, Rose commenced an action against Defendant in this Court, *Black v. Black* (Civil No. 76-5579), alleging that on the date of Rose's conveyance to Defendant, she was "so impaired by advanced age and illness that she was temporarily rendered incapable of managing her affairs or of understanding her property rights." The Complaint also alleged that, at the time of the conveyance, "while (Rose) was in a weak and infirm condition and incapable of exercising sound business judgment, (Defendant), the son of (Rose), by means of fraud and undue influence, induced" Rose to sign the deeds.

Early in 1977, Rose drew a new will ("the 1977 Will"), leaving all her estate to Plaintiff.

In the spring of 1977, pursuant to an order of reference from a Justice of this Court, *Black v. Black*, *supra*, was heard by a Master, who on May 31, 1977, filed a detailed report.

On October 6 and 7, 1977, *Black v. Black*, *supra*, was tried to a jury. The presiding justice submitted to the jury the following question: "Did Rose Black on July 14, 1976, at the time when she signed the three deeds in controversy in this case have sufficient mental capacity to fairly understand the nature and consequences of her actions?" The jury answered "Yes," and the presiding justice entered judgment for Defendant, dismissing the action on the merits. Rose seasonably moved for a new trial, which the Court denied; she thereupon appealed. While the litigation was proceeding through the appellate process, Rose died (January, 1978).

By an order of transfer dated August 15, 1978, the Supreme Judicial Court took jurisdiction over the appeal of *Black v. Black*, *supra*. After argument, the Court, on November 1, 1978, entered a rescript opinion which reads, in relevant extract:

> Since the record supports the jury verdict, there was no error in the judge's denial of the plaintiff's motion for a new trial.

The rescript was: "Judgment affirmed," 1978 Mass. Adv. Sh. 2752. Judgment pursuant to the rescript entered on December 1, 1978. The 1977 Will has been admitted to probate by a judge of the Middlesex Division of the Probate Court Department of the Trial Court.

Present Issues.

Plaintiff argues that because a Justice of this Court denied an earlier Motion by Defendant for Summary Judgment, Defendant cannot assert the preclusive effect of *Black v. Black, supra*. However vital the principle of the law-of-the-case, *cf Peterson v. Hopson*, 306 Mass. 597, 601-605 (1940), and despite the strong policy against twice-pressed motions for summary judgment, *see* 8 J. Smith & H. Zobel, *Rules Practice* 347 (1977), the present objection is invalid.

In denying the earlier motion, the Court gave as its reason (written on the face of the motion): "After argument of counsel, examination of the affidavits and attachments thereto, there exists a dispute as to a material issue of fact." The judge, however, did not specify this "material issue." In any event, the Court's statement makes plain that Plaintiff prevailed, not because Defendant's defense was legally insufficient, but because, at the time the Court wrote, at least one material fact was in issue. What was true then may not be true now. Thus we need not pause to consider either the power of one judge to revise the interlocutory order of another, *Peterson v. Hopson, supra*, at 604, or the propriety of such revision, *id.* at 603. In short, the issue before the Court today is not the issue which the earlier decision resolved. One must recall that the present question does not arise on a motion for summary judgment. A motion to dis-

miss after a Plaintiff's opening is, in degree and kind, more like a motion for a directed verdict than a motion for summary judgment. Because the Court credits all facts and inference in the plaintiff's favor, no factual disputes remain for consideration. Whatever issue of fact the judge who denied summary judgment may have discerned, by the close of Plaintiff's opening, that issue had either disappeared or been (for present purposes) resolved in Plaintiff's favor. Defendant's failure to win summary judgment does not guarantee Plaintiff the right to a full evidentiary trial. If the facts and inferences contained in Plaintiff's opening could not establish a legal basis for recovery, dismissal was not merely proper, but necessary.

We need consider, therefore, only whether the judgment in *Black v. Black, supra*, precludes Plaintiff's pursuit of Defendant. The key questions here are: (1) Can "the same persona...be conceived to have litigated in both actions"; and (2) Was the determination which Defendant seeks to import from *Black v. Black, supra*, not only litigated there, but essential to the judgment, *Rudow v. Fogel*, 1978 Mass. Adv. Sh. 2810, 2814.

First, the nub of the present complaint is that Defendant "by undue influence and fraud perpetrated upon (Rose) prevented (Plaintiff) from receiving" the Property through the devise in the 1966 will. A would-be beneficiary stands, as against a proprietary usurper, in the shoes of the testator, *see* Restatement, *Property* §87; *Old Dominion Copper Mining and Smelting Co. v. Bigelow*, 203 Mass. 159, 218 (1909); this is a variant of the principle that a successor in interest is in privity to her predecessor, *MacCormac v. Murphy*, 322 Mass. 228, 231 (1948), and cases cited. Rose and Plaintiff shared interests sufficiently identical to permit (or, indeed, compel) the Court's treating them as one.

Second, Defendant argues that *Black v. Black*, *supra*, determined: (1) That Rose was mentally competent when she conveyed the Property to Defendant; and (2) That Defendant did not obtain the conveyance through fraud. Defendant is correct.

Even though *Black v. Black*, *supra*, went to the jury on one special question, the judgment concluded all issues within the pleadings. "If...the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict", Mass. R. Civ. P. 49(a). The relevant language of Rule 49(a), that is to say, achieves in this case the same result, flowing from the customary truism that precludes retrying, not only issues which *were* actually tried in the earlier litigation, but issues which *could* have been tried, *Pan-American Match, Inc. v. Sears, Roebuck & Co.*, 454 F.2d 871, 875 (1st Cir. 1972), collecting cases.

The pleadings in *Black v. Black*, *supra*, raised the issue of fraud. Thus the failure of either party to ask the Court to submit to the jury a specific question pertaining to the fraud issue left the matter for the Court's decision. The Court having failed to make any such finding, we must assume, for all purposes, that the Court did make a finding compatible with the judgment which it entered (for the Defendant) on the special verdict. That judgment laid finally to rest, as between Rose and Defendant, all questions of fraud in the inducement of the conveyance of the Property.

Third, the gist of the Complaint in *Black v. Black*, *supra*, was an allegation that "while (Rose) was in a weak and infirm condition and incapable of exercising sound business judgment, (Defendant), by means of fraud and undue influence"

induced conveyance of the Property. A judgment for Defendant would require not merely a finding that, at the time of the conveyance, Rose was competent, but also a finding that Defendant had not obtained the Property from her through chicane. That is, a finding of competency, coupled with a finding of fraud/undue influence, would have required a judgment for Rose; a finding of incompetency (whatever the finding on the other issue) would have effected the same result.

Thus it is clear that the finding of no-fraud/undue influence which Defendant seeks to transfuse into the present litigation from *Black v. Black*, *supra*, was "essential to the judgment" there, *Rudow v. Fogel*, *supra*, at 2814. That being so, the judgment in Black v. Black, *supra*, precludes Plaintiff's recovery here.[1]

Accordingly, it is Ordered, that the complaint herein be dismissed, costs to the Defendant.

[SIGNED]

Hiller B. Zobel
Justice of the Superior Court

Dated: May 28, 1980

[1] It is thus unnecessary to consider whether the Statute of Frauds, M.G.L.A. c. 259, §§1, 5, in any way also precludes Plaintiff's recovery.

RESCRIPT OPINION.

MARION KAPLAN *vs.* SAMUEL W. BLACK (and a companion case). May 29, 1981. 1. The action numbered 79-759 was properly dismissed for the reasons given by the judge in his comprehensive and carefully reasoned memorandum and order for judgment. In addition to the authorities cited by the judge, see *Willett* v. *Webster*, 337 Mass. 98, 102 (1958); *Fassas* v. *First Bank & Trust Co.*, 353 Mass. 628, 629-630 (1968); *Dwight* v. *Dwight*, 371 Mass. 424, 427-430 (1976); *Boyd* v. *Jamaica Plain Co-op. Bank*, 7 Mass. App. Ct. 153, 160-164 (1979);[a] *Morganelli* v. *Building Inspector of Canton*, 7 Mass. App. Ct. 475, 479-480 (1979).[b] As dismissal was required by the applicable principles of law, we need not decide whether the judge (a) was acting under Mass.R.Civ.P. 12(c), 365 Mass. 756 (1974), (b) was exercising his power to dismiss at the close of the plaintiff's opening statement (see Smith & Zobel, Rules Practice § 41.9 [1977]), or (c) was correcting the earlier mistake made by a different judge who had denied the defendant's motion under Mass.R.Civ.P. 56, 365 Mass. 824 (1974). See *Peterson* v. *Hopson*, 306 Mass. 597, 601-605 (1940); *Coolidge Bank & Trust Co.* v. *First Ipswich Co.*, Mass. App. Ct. , (1981);[c] *Genesco, Inc.* v. *Kaufman*, Mass. App. Ct. , - (1981).[d] 2. In the action numbered 79-814, it does not appear that any question was raised below (see, e.g., *John B. Deary, Inc.* v. *Crane*, 4 Mass. App. Ct. 719, 724 [1976]) as to whether summary process was

[a] Mass. App. Ct. Adv. Sh. (1979) 337, 345-351.
[b] Mass. App. Ct. Adv. Sh. (1979) 811, 816-818.
[c] Mass. App. Ct. Adv. Sh. (1981) 217, 218.
[d] Mass. App. Ct. Adv. Sh. (1981) 718, 721-722.

the proper vehicle for recovering possession of premises which the courts had already determined were the property of Samuel W. Black. See *Black* v. *Black*, 376 Mass. 929 (1978).[e] To the contrary, counsel expressly agreed with the judge that the result in No. 79-759 would control the result in No. 79-814. 3. Both judgments are affirmed, with double costs (G.L. c. 211A, § 15); Black is to have counsel fees on appeal (see *Katz* v. *Savitsky*, Mass. App. Ct. , n.8 [1980];[f] *Leventhal* v. *American Discount Corp.*, Mass. App. Ct. , - [1981][g]) in the amount of $1,000, with an execution for that amount to issue out of the Superior Court in the action numbered 79-759.

So ordered.

Nicholas J. Decoulos (*Louis J. Muggeo* with him) for Marion Kaplan & another.

Elihu Pearlman (*Fred Erlich* with him) for Samuel W. Black.

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[e] Mass. Adv. Sh. (1978) 2752.

[f] Mass. App. Ct. Adv. Sh. (1980) 2113, 2119 n.8.

[g] Mass. App. Ct. Adv. Sh. (1981) 535, 536-537.

ORDERS.

The Supreme Judicial Court has made the following orders with respect to applications for leave to obtain further appellate review:

July 15, 1981.

Granted:

COMMONWEALTH *vs.* RICHARD N. CHASE. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1035.

Denied:

CARE AND PROTECTION OF TWO MINORS. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1094.

CHOMERICS, INC. *vs.* JOHN E. EHRREICH & another. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1040.

LOUIS B. CLOWS & another *vs.* PLANNING BOARD OF MIDDLETON. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1213.

COMMONWEALTH *vs.* ROBERT A. BAILEY. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1182.

COMMONWEALTH *vs.* JASPER DEERAN. Reported below: Mass. App. Ct. Adv. Sh. (1980) 1933.

COMMONWEALTH *vs.* ARTHUR F. JOSEPH, III. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1028.

COMMONWEALTH *vs.* ROBERT MCQUADE. Reported below: Mass. App. Ct. Adv. Sh. (1980) 1775.

JOHN D. AHERN CO., INC. *vs.* TRUSTEES OF BOSTON UNIVERSITY (and a companion case). Reported below: Mass. App. Ct. Adv. Sh. (1981) 1108. MR. JUSTICE BRAUCHER and MR. JUSTICE LIACOS recused.

MARION KAPLAN *vs.* SAMUEL W. BLACK (and a companion case). Reported below: Mass. App. Ct. Adv. Sh. (1981) 1033.

JOSEPH W. MACDONALD *vs.* ROBERT S. HAWKER. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1014. MR. JUSTICE NOLAN recused.

LAWRENCE SMITH & others *vs.* ERNEST C. CAGGIANO. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1101.

July 29, 1981

Denied:

COMMONWEALTH *vs.* JOHN K. SMAJKIEWICZ. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1025.